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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-202762 DATE: January 5, 1982

MATTER OF: Columbia Research Corporation

DIGEST:

1. Provision of Pub. L. 95-507 (95th Cong., 2nd. sess.), requiring the negotiation with awardee of a small business subcontracting plan prior to award, is not applicable to protested procurement because contract offered no subcontracting possibilities. Record shows that awardee maintained an in-house capability to perform the contract work.

2. GAO concludes that procuring agency imposed appropriate conditions in awardee's contract to avoid any conflict that might arise from the awardee having to evaluate any military equipment manufactured either in whole or part by it. Clause in awardee's contract required awardee to make an immediate and full disclosure to the contracting officer of any potential organizational conflict of interest discovered by the awardee during performance of the contract. If the awardee does not disclose potential conflict, the Government may terminate the contract for default.

3. Procurement officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Cost/technical tradeoffs may be made and the extent to which one may be sacrificed for the other is governed only by tests of rationality and consistency with established evaluation factors. Evaluation scheme in protested solicitation stated that technical criteria were to be substantially more important than cost considerations. The record also shows that agency's board determined awardee's technical proposal was superior overall by a significant margin.

4. It is improper for an agency to depart in any material way from the evaluation plan described in the solicitation without informing the offerors and giving them an opportunity to restructure their proposals. However, while agencies are required to identify the major evaluation factors applicable to a procurement, they need not explicitly identify aspects that are logically and reasonably related to the stated factors. Record shows that after receipt of initial proposals, agency's board properly instructed technical evaluators not to award extra points for personnel resumes of an offeror which showed education and experience that exceeded solicitation requirements.

Columbia Research Corporation (Columbia) protests the award of a contract to the General Electric Company (G.E.) under solicitation No. N00019-80-Q-0057 issued by the Naval Air Systems Command (NAVAIR). The solicitation was for the performance of reliability and maintainability engineering services during fiscal year 1981 on various items of military equipment. The solicitation also provided for four 1-year options covering fiscal years 1982 through 1985.

Columbia raises the following grounds of protest:

(1) A small business subcontracting plan was not included in and made a material part of G.E.'s contract, in violation of Pub. L. 95-507, 92 Stat. 1757 (95th Cong., 2nd sess.);

(2) Under the terms of the solicitation, the contractor was required to make free and unbiased technical recommendations concerning the suitability of certain aircraft and missile systems. Because G.E. was the supplier of a substantial portion of such equipment, the award to G.E. created an organizational conflict of interest; and

(3) The award to G.E. at a price that was nearly 40 percent higher than that offered by Columbia constituted an unreasonable and unnecessary expenditure of public funds by the agency.

We deny the protest.

Small Business Subcontracting Plan

Columbia contends that Pub. L. 95-507 required the negotiation of a small business subcontracting plan before the award of the contract to G.E. Columbia states that the solicitation included a clause which provided for such negotiation with the successful offeror, as required by the act. However, while G.E. initially submitted a 16-page small business contracting plan with its proposal, the company's best and final offer indicated that "0" percent of the estimated costs would be subcontracted to small business. Columbia argues that notwithstanding G.E.'s initial representation that it proposed to subcontract with small business, a subcontracting plan was not negotiated and made a part of G.E.'s contract.

Columbia further asserts that in passing Pub. L. 95-507, it was the intent of the Congress that large business firms receiving substantial Government contracts should subcontract a portion of the work to small businesses. According to Columbia, Pub. L. 95-507 was not meant merely to encourage large firms to subcontract with small businesses, but that where there are qualified small business subcontractors available, Pub. L. 95-507 requires the large businesses to enter into subcontracts with them. Columbia emphasizes that there were qualified small business firms to perform part of the contract work because three of the eight offerors under the solicitation were, in fact, small businesses.

NAVAIR states that the solicitation contained a clause requiring offerors to estimate what amount of the total cost of the contract would be for subcontracts and of that amount what percentage would be subcontracted to small businesses and small disadvantaged businesses. NAVAIR further states that while G.E.'s original proposal did indicate that the company intended to subcontract 7 percent of its subcontract effort to small business, G.E.'s technical proposal contained no subcontractor resumes or other specific information concerning such subcontractor effort. NAVAIR indicates that it requested, during written discussions, that G.E. submit resumes and other

information regarding G.E.'s small business subcontracting effort. Because G.E.'s best and final offer did not respond to this request, NAVAIR states that it concluded that no subcontracting effort whatever was planned by G.E. during the period of the basic contract. According to NAVAIR, this conclusion was confirmed when G.E., as the apparent successful offeror, submitted a small business subcontracting plan showing a zero amount for subcontracts. Consequently, NAVAIR takes the position that no small business subcontracting plan was required for the basic contract period because no "subcontracting possibilities" existed for this period.

Analysis

Section 211(d)(4)(B) of Pub. L. 95-507 provides that before the award of any negotiated contract exceeding certain prescribed amounts which "offers subcontracting possibilities," the apparent successful offeror shall negotiate with the procurement authority a subcontracting plan for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals. Here, however, NAVAIR concluded no subcontracting possibilities existed because G.E., the awardee, maintained the in-house capability to perform the contract work. We find from our review of the record that this conclusion is supported by the fact that in past engineering analyses contracts with the Navy, G.E. customarily performed the work in-house rather than contracting with third parties. Moreover, the solicitation contained a Substitution of Personnel clause which required the successful offeror to employ for the first 90 days of the contract only those individuals whose resumes were submitted for evaluation by NAVAIR during the procurement process. The record shows that NAVAIR evaluated G.E.'s proposal in the area of personnel capabilities on the basis of the company's use of in-house personnel.

As to Columbia's argument that Pub. L. 95-507 requires large businesses to subcontract with small businesses rather than perform the contract work in-house, we recognize that the requirement in section 211(d)(6) for a subcontracting plan to be included in a contract as a material element might be viewed as an indication that subcontracting is required. On the

other hand, the same section of the statute requires a prospective contractor's subcontracting plan to describe

> "* * * the efforts the offeror or bidder will take to assure that small business concerns and small business concerns owned and controlled by the socially and economically disadvantaged individuals will have an equitable opportunity to compete for subcontracts."

This provision suggests that Congress intended to insure that small and small-disadvantaged businesses have a fair chance to compete for subcontracts when subcontracting opportunities would be made available by the prime contractor, not that firms have a right to subcontracts notwithstanding the prime contractor's intention not to subcontract.

We also find nothing in the legislative history of Pub. L. 95-507 to indicate that Congress intended that a contractor be required to subcontract. The history generally discusses the fact of the requirement for a subcontracting plan as a material part of the contract. We do note, however, that the Senate Committee on Governmental Affairs, in considering the bill that resulted in Pub. L. 95-507 (H.R. 11318), commented that the clause in section 211(d)(3) which states the Federal Government's policy, and is to be included in contracts subject to section 211(d), "is a 'best efforts' clause, which requires the contractor to adhere to federal policy if it awards subcontracts * * *." (Emphasis added.) We think the words "in the awarding of subcontracts" as prescribed in section 211(d)(3), when read in light of the Committee's comment, suggest that the contractor must plan for use of small business subcontractors only if the firm is awarding subcontracts.

Compelling a prime contractor to subcontract for portions of the work required by a contract would drastically change the prime contractor's traditional discretion in that respect. We think it is reasonable to believe that if Congress had intended to compel subcontracting, it would have been more explicit in indicating that intention. Consequently, we cannot

conclude that the statute should be read as requiring subcontracting by a prime contractor with the Federal Government.

In any event, we note that subsequent to the award, NAVAIR did negotiate a small business subcontracting plan with G.E. By amendment, this plan was made a part of G.E.'s contract and took effect on July 1, 1981, when the contractually imposed 90-day bar on the substitution of personnel was lifted.

Conflict of Interest

Columbia contends that an organizational conflict of interest was created by the award to G.E. because of G.E.'s position as a manufacturer, which diminished the company's capacity to give impartial, technically sound, objective assistance and advice to the Government. Columbia points out that G.E. has for many years manufactured and supplied engines, armament and fire control systems for the most advanced United States Navy aircraft. Columbia argues that because G.E. is required under the terms of its contract to make unbiased recommendations to the Government concerning the reliability and maintainability of G.E.-produced aircraft system components, G.E. has clearly been placed in a position where it can make decisions favoring its own products. Thus, Columbia takes the position that a contract which requires reliability and maintainability studies should not have been awarded to a company whose own hardware is involved.

Analysis

We think that NAVAIR has imposed appropriate conditions in G.E.'s contract to avoid any conflict that might arise during performance. The record shows that to avoid any potential conflict, NAVAIR included the following clause in the solicitation:

"K-33 Organizational Conflict of Interest

"Because the performance of the effort under this contract will require access to other contractor's proprietary data and the ability to make free and unbiased recommendations to the Government, the

Government will require the inclusion of an Organizational Conflict of Interest clause in the contract in accordance with DAR Appendix G.

"Offerors are, therefore, required to submit a suggested clause (which will not be evaluated for purposes of selection of the contractor), for negotiation, concerning the avoidance of an organizational conflict of interest."

The clause that G.E. submitted in response to the solicitation request was negotiated and made a part of G.E.'s contract. The contract clause provides, in pertinent part, as follows:

"H-11 ORGANIZATIONAL CONFLICT OF INTEREST

"(1) General

"(a) The term 'organizational conflict of interest' means that a relationship exists whereby the Contractor (including affiliated divisions, consultants, or sub-contractors) has interests which (1) may diminish his capacity to give impartial, technically sound, objective assistance and advice or may otherwise result in a biased work product, or (2) may result in an unfair competitive advantage. It does not include the 'normal flow of benefits' from the performance of a contract.

"(b) The contractor warrants that, to the best of his knowledge and belief, he does not have any organizational conflict of interest, as defined in subparagraph (a).

"(c) The Contractor agrees that, if in the performance of this contract he discovers a potential organizational conflict of interest with respect to this contract, he shall make an immediate and full disclosure in writing to the Contracting Officer which shall include a description of the actions which the Contractor has taken or proposes to take to avoid,

eliminate or neutralize the conflicts. In the event that the Contractor does not disclose a known potential conflict to the Contracting Officer, the Government may terminate the contract for default.

"(d) If the Contractor is directed by authorized Government personnel by written tasks or verbal directions (in a program review or otherwise) to perform services which the Contractor believes to constitute a potential Organizational Conflict of Interest, the Contractor is required to notify the Principal Contracting Officer (PCO) in writing of the nature of the Conflict of Interest within ten (10) days after receipt of the Government directive, so that a determination may be made. No effort shall be expended toward the performance of the services in question until this determination has been made or unless otherwise directed by the PCO."

NAVAIR states that if a potential conflict is identified during the performance of the contract, it will either perform the particular task in-house or competitively select another contractor.

Columbia, however, argues that there is not merely an undefinable potential conflict of interest but rather a continuing "actual" conflict of interest that arose on the date of the contract award because G.E. manufactured several major components of the contract line items being evaluated. As noted above, G.E. has warranted that to the best of its knowledge, it does not have any organizational conflict of interest. If an organizational conflict does arise during the course of evaluating the military equipment listed in the contract involving the components that G.E. manufactured, G.E. has the burden to disclose the conflict and to neutralize or avoid it. If G.E. does not do this, the company runs the risk of having its contract terminated for default by the Government. Through the use of clause H-11, we believe the Government has taken adequate steps to protect itself in this situation.

Award at Higher Price

While recognizing that in a procurement of technical services, factors other than cost should receive substantial consideration, Columbia maintains that at some point in the evaluation of offers, consideration must also be given to cost factors. Columbia alleges that NAVAIR's consideration of the technical and management factors involved in the procurement revealed a disparity of only 3 percent between the initial point scores of G.E. and it. In view of such a small differential, Columbia questions NAVAIR's willingness to pay a 40 percent higher cost than the amount it proposed. Columbia also points out that its proposed cost was based upon a labor category averaging technique that has been recommended by the Government for a substantial period of time. Columbia asserts, moreover, that its quoted price was consistent in every respect with its Government pricing practices and, thus, "realizable" to NAVAIR had NAVAIR chosen Columbia as the awardee.

In addition, Columbia asserts that after the initial technical evaluation, NAVAIR changed the basis upon which the offerors' resumes of educational experience were to be evaluated, as well as the factors which made up the technical score for management. Columbia alleges that while NAVAIR amended the solicitation to give offerors notice of the additional subcriteria under the factor "Management Organization and Plan," offerors were not notified of either the alleged changes in the evaluation criteria or the realignment of points for evaluating the offerors' educational resumes. According to Columbia, the alleged realignment of points favored G.E. because after best and final offers Columbia's proposal went from being ranked first under the most important evaluation criterion, "Personnel," to second behind the proposal of G.E.

NAVAIR responds that after the final evaluation, G.E. received a total technical score of 3873 to Columbia's 3592. NAVAIR also states that it decided the difference in the technical scores between the two companies was significant and that, thus, it was to the Government's advantage to pay a higher cost in order to obtain the superior G.E. proposal.

NAVAIR points out that the solicitation cautioned offerors that the technical criteria was to be substantially more important in the selection of an awardee. NAVAIR emphasizes that under the solicitation's source selection scheme, cost was an important factor in the selection scheme only where the technical ranking of two or more proposals in the competitive range was equal or nearly equal.

As to Columbia's assertion that one of the technical evaluation criteria was improperly changed, NAVAIR contends that it was not required to notify the offerors when the method used to evaluate the offerors' resumes was revised. NAVAIR argues that it did not change the evaluation criteria, subcriteria or the weights assigned to each criteria. NAVAIR argues that its procurement review board studied the method used by the technical evaluators to evaluate resumes and determined that this method had not adequately followed the guidance set forth in the solicitation. NAVAIR states that, as a result, the technical evaluators were advised that in evaluating resumes they should consider the relevance of the listed education and experience and that extra points should not be awarded to resumes showing educational degrees in excess of the solicitation's requirements.

Analysis

The solicitation provided that the offerors would be evaluated on the basis of the following technical criteria: (1) personnel capabilities; (2) technical comprehension; and (3) management organization and plan. The qualifications and experience of the offeror's proposed personnel were the most important criteria. The record shows that NAVAIR's evaluation board determined that G.E.'s technical proposal was superior overall by a "significant margin." According to the board, the area in which the technical scores revealed the greatest margin between G.E. and the other offerors was in personnel capabilities. Also, the board ranked G.E. the highest in the area of technical comprehension.

In a negotiated procurement, procurement officials have broad discretion in determining the manner and extent to which they will make use of the technical

and cost evaluation results. Cost/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with the established evaluation factors. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325. As we noted in 52 Comp. Gen. 358, at 365 (1972), the determining element is the considered judgment of the procuring agency concerning the significance of the difference in technical merit among the offerors. Thus, we have upheld awards to higher rated offerors with significantly higher proposed costs because it was determined that the cost premium involved was justified considering the significant technical superiority of the awardee's proposal. Riggins & Williamson Machine Company, Incorporated, et al., 54 Comp. Gen. 783 (1975), 75-1 CPD 783.

As indicated in Hager, Sharp & Abramson, Inc., B-201368, May 8, 1981, 81-1 CPD 365, where the agency procurement officials have made a cost/technical tradeoff, the question is whether the determination to make the award to the contractor was reasonable in light of the solicitation's evaluation scheme. In view of the fact that personnel capabilities was the most important evaluation criterion, we find that NAVAIR's determination to award to G.E., the offeror which received the highest technical score in that area, was consistent with the solicitation's evaluation scheme.

With respect to Columbia's assertion that the solicitation's evaluation criteria for personnel capabilities were improperly changed, we have stated that procuring agencies do not have the discretion to announce in a solicitation that one evaluation plan will be used and then follow another in the actual evaluation. See Umpqua Research Company, B-199014, April 3, 1981, 81-1 CPD 254. Once offerors are informed of the criteria against which their proposals will be evaluated, the agency must adhere to those criteria or inform all offerors of any significant changes made in the evaluation scheme. Telecommunications Management Corporation, B-194584, August 9, 1979, 79-2 CPD 105. Consequently, it is improper for an agency to depart in any material way from the evaluation plan described in a solicitation without

informing the offerors and giving them an opportunity to structure their proposals with the new evaluation scheme in mind. Umpqua Research Company, supra.

On the other hand, while agencies are required to identify the major evaluation factors applicable to a procurement, they need not explicitly identify the various aspects of each which might be taken into account. All that is required is that those aspects not identified be logically and reasonably related to or encompassed by the stated evaluation factors. Buffalo Organization For Social and Technological Innovation, Inc., B-196279, February 7, 1980, 80-1 CPD 107. Here, the solicitation clearly stated that the resumes submitted by the offerors would be evaluated on the basis of the qualifications and experience of the personnel "proposed for this contract." Thus, we think that NAVAIR's instruction to the technical evaluators to consider only the relevance of the evaluation and experience and not award extra points for resumes with educational degrees in excess of solicitation requirement was logically and reasonably related to the personnel capabilities evaluation factor in the solicitation.

Conclusion

Accordingly, we deny Columbia's protest.

Harry R. Van Cleve

For the Comptroller General
of the United States